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# Constitutional Law - Appointment by Governor to Fill Temporary Vacancies

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isiana decisions will ever be based upon the implied warranty theory. By applying the unique theory which our courts have devolved from the negligence concept, bottlers are held to a liability just as strict as it would be under the implied warranty theory.

The negligence approach of the Louisiana decisions enables the courts to avoid the troublesome aspects of privity inherent in the implied warranty theory and yet achieves the same practical results. By not having committed themselves to the warranty theory the Louisiana courts provide a flexibility of decision which will permit a more equitable disposition of extreme cases.

H. C. L.

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CONSTITUTIONAL LAW — APPOINTMENT BY GOVERNOR TO FILL TEMPORARY VACANCIES—On December 20, 1941, George E. Williams, criminal sheriff for the Parish of Orleans, died in office. His unexpired term was only three months and fourteen days. On the same day the judges of the criminal district court held a session en banc and under Section 93 of Article VII of the Louisiana Constitution<sup>1</sup> appointed John J. Williams to serve until the vacancy should be filled by election or by appointment by the Governor "as provided by law."<sup>2</sup> Later in the same day, the Governor appointed Campbell Palfrey for the unexpired term. On December 22, 1941, Palfrey demanded the office of Williams, but the latter refused. On the same afternoon the judges held another session and decided that, since the incumbent had contested the claim of Palfrey, and since the outcome of the contest would depend upon the validity of the appointment of Palfrey by the Governor, the court would continue to recognize Williams as temporary sheriff until and unless he should be ousted by a judgment of a civil court having jurisdiction over contests for title to public office. Palfrey filed a petition in the supreme court for supervisory writs to compel the judges of the criminal district court for the Parish of Orleans to recognize him as criminal sheriff for the

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1. "... vacancies in the office of the criminal sheriff [for the Parish of Orleans], clerk of the Criminal District Court, clerk and constable of the city courts, shall be filled temporarily by the judges of the courts to which they are attached, and all of said appointees shall serve until such vacancies are filled by election or appointment, as provided by law."

2. "Vacancies occasioned by death, resignation or otherwise, in the office of . . . sheriff . . . where less than one year, shall be filled by appointment by the Governor, with the advice and consent of the Senate. . . ." La. Const. of 1921, Art. VII, § 69.

unexpired part of the term. *Held*, writs denied since the Governor has no authority to make a recess appointment under the Constitution in a case where the temporary filling of vacancy<sup>3</sup> is otherwise provided for in the Constitution. *State ex rel. Palfrey v. Judges of Criminal District Court of the Parish of Orleans*, 199 La. 232, 5 So. (2d) 756 (1942).

Article V, Section 12, of the Constitution of 1921 provides that "the Governor shall have the power to fill vacancies that may occur during the recess of the Senate, *in cases not otherwise provided for in this Constitution*. . . ." (Italics supplied.) Article VII, Section 93, of the Constitution of 1921 provides, in effect, that vacancies in the office of criminal sheriff shall be filled temporarily by the judges of the criminal district court<sup>5</sup> until they are filled "as provided by law." Section 69 of the same article specifies that the Governor shall by appointment fill a vacancy in the office of sheriff which is caused by death when the unexpired term is less than one year,<sup>6</sup> but that this appointment be with the advice and consent of the Senate. The decision in this case can only be understood by considering together these three provisions.

There is no doubt that the judges had authority under Section 93 of Article VII to fill the vacancy *temporarily* by appointing John J. Williams to serve until the vacancy should be filled by appointment "as provided by law." But it is readily seen that the Governor's appointment of Palfrey without the advice and consent of the Senate (the Senate not being in session) was not "as provided by law."<sup>7</sup> This is so because Article VII, Section 69, requires the appointment by the Governor to be with the advice and consent of the Senate. Under these limitations the Governor

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3. The word "vacancy" in its literal and precise sense means a place that is empty or unoccupied but, as applied to the expiration of a term of office, it is ordinarily given a literal, more figurative, meaning, conforming to the intention of the lawmaker and the purpose to be accomplished. *State v. Young*, 137 La. 102, 68 So. 241 (1915).

4. Article V, § 18, lists some of such offices, i.e., the state treasurer, auditor, secretary of state, registrar of the state land office, and the commissioner of agriculture and immigration.

5. See note 1, *supra*.

6. See note 2, *supra*.

7. While the court in this case interpreted the word "law" as synonymous with the word "constitution," it might well be that the draftsmen of the constitution meant statute law; that they intended to leave the problem for the legislature. According to Words and Phrases (Perm. ed.) vol. 34, p. 680: "The phrases 'prescribed by law' and 'provided by law' when used in constitutions, generally mean prescribed or provided by statutes: *Lawson v. Kanawha County Court*, 92 S.E. 786, 789, 80 W.Va. 612."

has authority to fill the vacancy by appointment only if the Senate is in session<sup>8</sup> and confirms his appointment.<sup>9</sup>

The Governor, therefore, in this case attempted a recess appointment. The only authority conferred upon the Governor to make recess appointments is found in Section 12 of Article V<sup>10</sup> and is limited to cases where the filling of the vacancy is not otherwise provided for in the Constitution. Because in the instant case the filling of the vacancy is otherwise provided for,<sup>11</sup> the Governor<sup>12</sup> had no authority to appoint Palfrey during the recess of the Senate.<sup>13</sup>

It must be observed, however, that Section 93 of Article VII is a special provision dealing with certain offices in the Parish of Or-

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8. Where the Governor, during a regular session of the legislature, nominated a man for coroner but failed to send his name to the Senate for confirmation, and again nominated the same man at a subsequent extra session, the confirmation at such session was held valid, the court saying that the Constitution [Art. III, § 8; Art. V, § 12] means only that appointment must be made while the Senate is convened. *State ex rel. Fernandez v. Feucht*, 163 So. 761 (La. App. 1935).

9. *State v. Tucker*, 23 La. Ann. 139 (1871); *State ex rel. Farror v. Garrett*, 29 La. Ann. 637 (1877).

10. "The Governor shall have the power to fill vacancies that may occur during the recess of the Senate, in cases not otherwise provided for in the Constitution by granting commissions which shall expire at the end of the next session. . . ."

11. See note 1, *supra*.

12. Article II, § 2, cl. 3, of the Federal Constitution reads in part: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session." It is to be observed that there is no provision in the Federal Constitution comparable to the provisions in Art. VII, § 69, and this is why the President is authorized to make recess appointments. It is also worthy of note that in cases "not otherwise provided for" the Governor of Louisiana may make recess appointments. The underlying idea is expressed in *State ex rel. Saint, Atty. Gen. v. Irion, Conservation Com'r*, 169 La. 481, 492, 125 So. 567, 570 (1929): "Obviously the purpose of section 12 of article 5 of the Constitution in providing for ad interim appointments is to avoid inconvenience or delay in the public business until the office can be filled in the ordinary way. The law abhors a vacancy as vigorously as nature abhors a vacuum, and its policy is always to have some one in place to discharge the duties of a public office."

13. It is interesting to speculate as to what would be the result of the Senate's meeting and confirming Palfrey's appointment before the expiration of the term. The court in the present case said no more than that his case "would present a very different question." The confirmation of the appointment at an extra session would probably be held to be valid because it has been held that nomination and confirmation at such a session is valid. *State ex rel. Fernandez v. Feucht*, 163 So. 761 (La. App. 1935). See note 7, *supra*.

In the case of confirmation at special session of ordinary recess appointments the courts have held that the Governor is *required* to have recess appointees confirmed by the Senate *only* at regular sessions; that it is discretionary to have his appointees confirmed at a special session. *State ex rel. Saint, Atty Gen. v. Dowling*, 167 La. 907, 120 So. 593 (1928); *State ex rel. Saint, Atty Gen. v. Irion, Conservation Com'r*, 169 La. 481, 125 So. 567 (1929).

leans *only*, whereas Section 69 of the same article embraces the office of sheriff in all other parishes. Thus it can be urged with force that Section 69 of Article VII has no bearing on this case because it and Section 93 do not relate to the same offices. The former applies to the office of sheriff but does not include the special office of criminal sheriff, which is peculiar to Orleans Parish. Moreover, Section 69 cannot afford a satisfactory solution to the problem caused by a vacancy in the office of sheriff in a parish other than Orleans, because although comprehensive in terms, it actually leaves a hiatus with respect to filling a vacancy in an unexpired term of less than a year for the combined reasons that it does not permit of recess appointments and the legislature is in regular session for only sixty days out of every two years. Therefore if such a vacancy occurs, for example, in adjoining St. Bernard Parish while the legislature is not in session, and the unexpired term is less than a year, there would be no possible legal means of filling the vacancy under the law as it now appears.

The instant case seems correctly decided under the constitutional provisions applicable. However, one cannot but observe that Mr. Palfrey's appointment was invalid only by reason of a chance occurrence—the fact that the Senate was in recess. If the Senate had been in session, then the Governor's appointment of Palfrey would have been "as provided by law" and Williams would have been sheriff for the temporary period of several hours instead of for the rest of the unexpired term.<sup>14</sup>

O.P.S.

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CONSTITUTIONAL LAW—INTERSTATE AND INTRASTATE COMMERCE  
UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT—The United States sought to compel the defendant to comply with the order of the Secretary of Agriculture<sup>1</sup> issued under the asserted authority of the Agricultural Marketing Agreement Act.<sup>2</sup> The declared

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14. According to Article III, § 8, of the Constitution, the legislature meets in regular session on the second Monday in May every second year. This being so, the legislature met only a few days after the expiration of the term of the office involved in this case. Of this the supreme court said in the instant case: "But this is merely an incident in this case, and does not compel a departure from the provisions in the Constitution for the filling of vacancies in public office." *State ex rel. Palfrey v. Judges of Criminal District Court of the Parish of Orleans*, 199 La. 232, 5 So. (2d) 756, 758, (1942).

1. Order No. 41, Aug. 23, 1939.

2. 50 Stat. 246, 7 U.S.C.A. § 608c (1937). For a complete and thorough explanation of the functioning of this act, see *United States v. Rock Royal Co-operative*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939).